

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

ORIGINAL

77-4217

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

OWNERS MAINTENANCE CORP.,

Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S BRIEF

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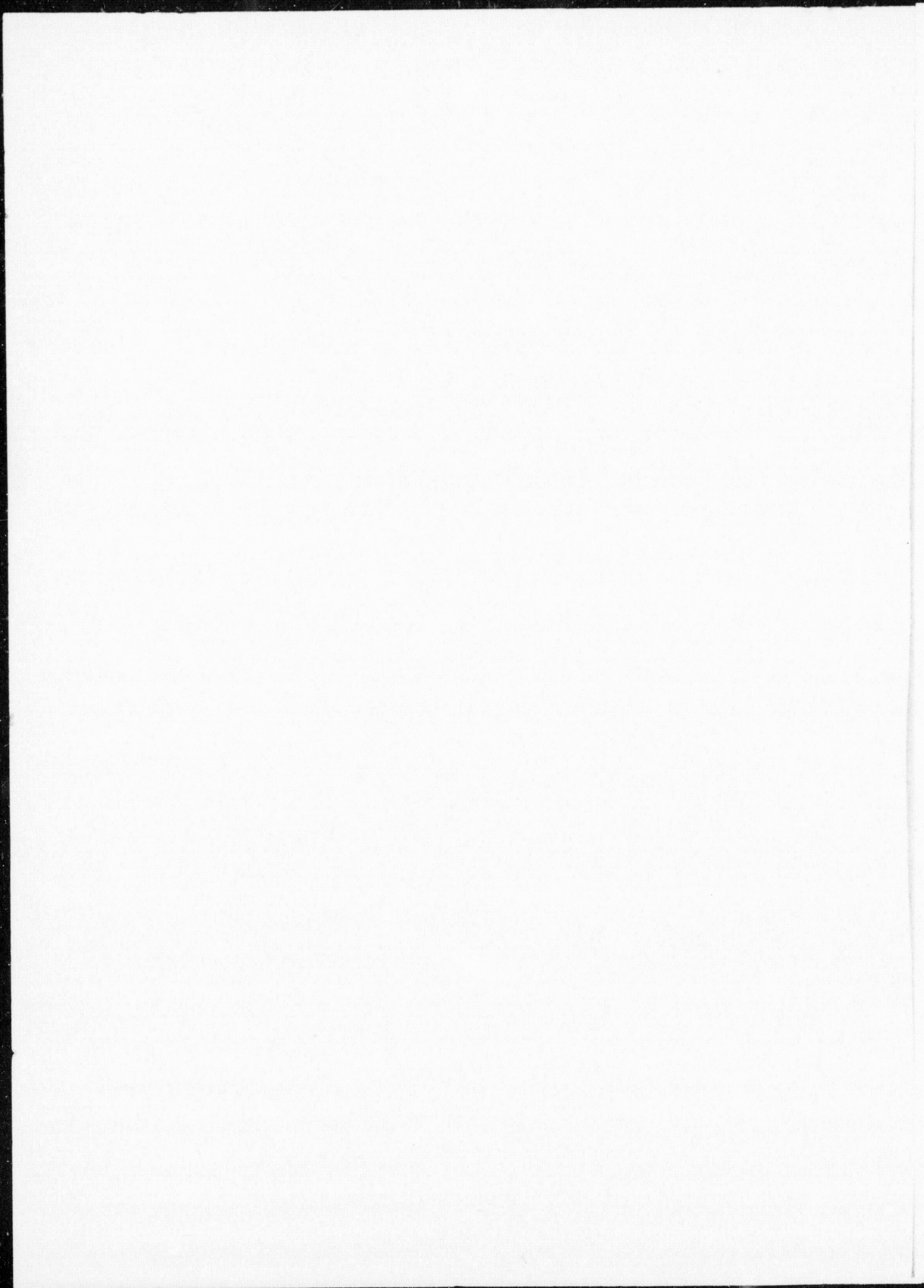


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	(i)
COUNTERSTATEMENT OF ISSUES PRESENTED	1
COUNTERSTATEMENT OF THE CASE	2
ARGUMENT:	
I. WITHOUR JUSTIFICATION, THE NLRB REFUSED TO DEFER TO AN ARBITRATOR'S OPINION WHICH MEETS EACH TEST FOR DEFERAL THE NLRB HAS ANNOUNCED; THE NLRB'S ORDER THEREFORE SHOULD NOT BE ENFORCED	15
II. SOTO AND VEVE'S LEAFLETING ACTIVITY WAS NOT PROTECTED BY THE ACT AND OMC'S CONSEQUENT REFUSAL TO REIN- STATE THEM DID NOT, THEREFORE, VIOLATE THE ACT	26
CONCLUSION	31

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Adolph Coors Co.</u> , 208 NLRB 676 (1974)	21
<u>American National Life Insurance Co.</u> , 44 LA 522 (Doyle 1965)	10
<u>American Ship Building Co. v. NLRB</u> , 380 U.S. 300 (1965)	18
<u>Amoco Oil Co. v. Atomic Workers</u> , 548 F.2d 1288 (7th Cir.), <u>cert. denied</u> , 431 U.S. 905 (1977).	9, 10
<u>Arnold Co. v. Carpenters District Council</u> , 417 U.S. 12 (1974)	15, 16, 17
<u>Dreis & Krump Manufacturing, Inc.</u> , 221 NLRB 309 (1975), <u>enf'd</u> , 544 F.2d 320 (7th Cir. 1976).	28, 29, 30
<u>Electronic Reproduction Service Corp.</u> , 213 NLRB 758 (1974)	16
<u>Emporium Capwell v. Waco</u> , 480 U.S. 50 (1975)	10-14, 24, 25, 27, 28-31
<u>Ingersoll Products Div.</u> , 49 LA 882 (Larkin 1967)	9
<u>NLRB v. Auburn Rubber Co.</u> , 384 F.2d 1 (10th Cir. 1967)	22-24
<u>NLRB v. General Stencils</u> , 438 F.2d 894 (2d Cir. 1970), <u>further</u> <u>opinion</u> 472 F.2d 170 (2d Cir. 1972)	22
<u>NLRB v. Lasaponara</u> , 541 F.2d 992 (2d Cir.), <u>cert. denied</u> , 430 U.S. 914 (1976)	24-30
<u>NLRB v. Metropolitan Life Insurance Co.</u> 380 U.S. 438 (1965)	22

<u>Pacific Northwest Bell Telephone</u> <u>Co., 48 LQ 498 (1967)</u>	10
<u>Spielberg Manufacturing Company,</u> <u>112 NLRB 1080 (1953)</u>	15, 16, 18, 19, 20, 22, 25
<u>Timken Roller Bearing Company,</u> <u>70 NLRB 500 (1946)</u>	18, 19, 20, 21, 25
<u>United Steelworkers of America</u> <u>v. Enterprise Wheel & Car</u> <u>Corp., 363 U.S. 593 (1960)</u>	25, 31

Other Authorities:

National Labor Relations Act, as amended, Section 8(a)(3), 29 U.S.C. §158(a)(3)	passim
Elkouri and Elkouri, How Arbitration Works (1977)	10
CC Labor Arbitration Awards (1976)	7



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NO. 77-4217

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-v-

OWNERS MAINTENANCE CORP.,

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On Petition for Enforcement of an
Order of the National Labor Relations Board

RESPONDENT'S BRIEF

COUNTERSTATEMENT OF
ISSUES PRESENTED

1. When an arbitrator has considered and decided each unfair labor practice issue subsequently before the National Labor Relations Board ["the NLRB"], in proceedings in which the arbitrator has allowed the grievants to be represented by attorneys of their own choosing, as well as their union's counsel, both of whom participated fully on grievant's behalf presenting evidence and briefing all issues, and the parties have agreed to

be bound by the arbitrator's award, but the NLRB refuses to defer to that award, rendering instead a contrary order, should not the NLRB's petition for enforcement of its order be denied?

2. When former employees leaflet the general public on a public street corner near the employer's place of business in a self proclaimed effort to pressure the employer on charges of racial discrimination - contrary to the specific advice of their union - and when these same employees in an attempt to influence the outcome of their case are involved in writing to the arbitrator hearing their union's claim that their discharges were not for just cause - ex parte and without the knowledge of their union - are these employees not engaged in activities which are unprotected under the National Labor Relations Act ["the Act"] so that the employers consequent refusal to reinstate them is lawful?

COUNTERSTATEMENT OF
THE CASE

The operative facts here are not in dispute. Thomas Soto and James Veve, whose discharges by Respondent Owners Maintenance Corp. ["OMC"] are the subject of this case, lied on their applications for employment with OMC.

OMC's employment applications state:

"I hereby affirm that the answers to the above are true and correct to the best of my recollection and understand that any falsification can result in my discharge if I am employed."

(A. 246)*

Soto had been arrested three times and Veve twice, prior to employment by OMC. Both had been convicted. Both Soto and Veve lied about this on their employment applications (A. 8-10, 70-72)

After an anonymous tip to OMC concerning various OMC employees which occurred amid numerous thefts in the building, the fact of Soto and Veve's lies became known. (A. 77, 130) They were then discharged on July 3, 1975.

Thereafter, grievances protesting the discharges were filed, almost immediately, on behalf of Soto and Veve by their Union, Local 32B.** The grievance procedure of Local 32B's collective bargaining agreement was fully utilized, culminating in a last step formal hearing prior to arbitration in which the grievance was denied. Then, arbitration was

* (A. ____) refers to pages in the Appendix.

** OMC is a member of the Realty Advisory Board on Labor Relations, Inc. ["RAB"]. The RAB and Local 32B have been parties to a series of collective bargaining agreements. At the time of the discharges, there was a collective bargaining agreement between the parties effective January 1, 1975 to December 31, 1977, which contained standard, binding grievance and arbitration clauses pursuant to which Soto and Veve's grievances were processed.

demanding, and the dispute was referred to Arbitrator George Marlin who held hearings on August 5, 1975, September 2, 1975, October 7, 1975, October 15, 1975, November 11, 1975, December 9, 1975 and January 13, 1976. At these hearings, Soto and Veve were represented by their union's general counsel, as well as counsel of their own choosing. (A. 244-245)

Not content, however, to let their duly authorized bargaining representative handle their grievances, Soto and Veve took matters into their own hands.

In the first week of July, after their discharges, and simultaneously with the filing of grievances, Soto and Veve leafleted in front of their former place of employment, One Penn Plaza. This is only a short distance from New York City's busy railroad terminal, Penn Station. (A. 38, 94-96) Soto and Veve occupied positions both on the public sidewalk in front of One Penn Plaza and in front of the main entrance to the building. This is not the entrance generally used by porters and cleaning people who are members of their union. No attempt was made to limit leafleting to Soto and Veve's fellow employees. Instead, the leaflets were distributed to the general public.

Moreover, there was no effort made to solicit similar grievances from fellow employees or otherwise use the contractual procedures. Neither the NLRB nor Soto and

Veve put on any evidence of their soliciting grievances. Support for the grievance process and the bargaining representative thus appears to have been the furthest thing from Soto and Veve's minds.

Indeed, Soto declared that the leaflet was distributed indiscriminately:

"Everyone received it "

(A. 64)

The leaflet distributed by the two to "everyone" excoriated OMC to the public and sought the public's support for Soto and Veve in getting their jobs back. Plainly, from its content and distribution to the general public, the point of the leaflet was to influence public opinion, not enhance the grievance procedure even then being invoked on Soto and Veve's behalf by their union. The leaflet stated:

"The real reason that brothers Jaime Veve and Tommy Soto have been fired from the day shift of the porters is because these workers have challenged the racist, discriminatory anti-labor, anti-woman practices in the building. Because they have dared to attempt to organize the workers in the building to stand up for their rights as humans."

(A. 226)

Soto and Veve, however, did not let matters go at that. In October, 1975 - after the Arbitrator had already

held three days of hearings and the grievants knew that OMC's position was that such leafleting would justify a refusal to reinstate them - they resumed their leafleting (A. 96). Again, they leafleted the general public despite the warning from their union's counsel not to do so because it would interfere with the union's grievance on their behalf (A. 182).

Ronald Raab, counsel to Local 32B and a member of the distinguished New York City labor law firm Israelson Manning and Raab stated unequivocally that he had advised against the leafleting:

"... I felt that the distribution of leaflets, the first ones and the second, because the first one had already been distributed before I had spoken to Mr. Soto, I felt it would make it more difficult to win the arbitration.

"Judge Goerlich: When did you give him such advice [not to leaflet]?"

"I was representing him at the arbitration proceeding."

(A. 182)

Soto and Veve did more than simply ignore their union's counsel's advice, however. They ignored the union completely. In fact, after hearings had commenced, they themselves were involved in a letter being written directly to the arbitrator, in an effort to influence the outcome of their case. (A. 243)

At no time was the union consulted about this letter. At no time did the union approve it.

Soto and Veve's purpose in all these activities was clear. They felt they might be the victims of racial discrimination. Frustrated because of this, they sought to go around their bargaining representative to achieve results for themselves (A. 58).

Soto's testimony established this very purpose. His intent was not to aid his bargaining representative in presenting the issue of employment discrimination to OMC, nor was it to work through contractually established procedures.

Rather, Soto's purpose was completely individual.

"I was trying to exert some pressure on some of the issues that were in the leaflet." (A. 58) (emphasis added)

Before the Arbitrator,* the issue was whether the July 3, 1975 discharges had been for just cause. The union, and Soto and Veve's own attorney, argued at length that the

* Arbitrator Marlin is the arbitrator designated in the labor contract between the Realty Advisory Board and Local 32B. He is not, as the NLRB erroneously insinuates, "the contract arbitrator for the Real Estate (sic) Advisory Board." (NLRB Brief, p. 12). Arbitrator Marlin is a lawyer and member of the New York State Mediation Board, a member of the National Academy of Arbitrators, in addition to being a leading labor arbitrator. CCH Labor Arbitration, Awards 9690 (1976).

discharges were really because of Soto and Veve's union activity. As the Arbitrator described it:

"Since the Union sought to prove that the grievants were really discharged for their union activity, it presented evidence of their activities on behalf of their fellow employees in terms of assisting them with grievances and making sure that the Company abided by the terms of the Collective Bargaining Agreement."

(A. 248)

Despite the Union's extensive case the Arbitrator found:

"The evidence and testimony adduced at the hearings is not sufficient to justify a finding that the grievants were discharged for engaging in Union activity." (A. 254)

He reasoned:

"In the instant matter, the record is without any evidence that the Company was seeking to rid itself of the Union. In fact, the Company and Helmsley-Spear have had a long and well-established collective bargaining relationship with the Union, not only at 1 Penn Plaza but at many premises throughout the City of New York. In light of this back-ground, a violation of Section 8(a)(3) cannot be found without substantial evidence to the effect that the Company sought to discourage the grievants from Union membership or engaging in Union activities."

(A. 255)

Then, thoroughly discussing the evidence, Arbitrator Marlin stated:

"Testimony adduced at the hearings did indicate that Soto had engaged in some Union activities of which the Company was aware. He was the shop steward for a short time before his discharge; was on occasion critical of the Company's hiring practices; and opposed the Company on several grievances. Aside from Soto's discharge, however, the Union failed to develop one significant incident of discrimination against him. The record contains no evidence of any anti-Union statements by a Company official either with respect to the grievants or otherwise. In fact, the record does not even indicate that Veve was significantly involved in Union activities." Id.

Thus, the Arbitrator concluded:

"The evidence is held to be insufficient to establish the fact that the discharges were unlawful within the meaning of Section 8(a)(3) of the Labor Management Relations Act." Id.

As was his prerogative, however, the Arbitrator did not sustain the July 3 discharges. He reasoned that although Soto and Veve concededly had falsified their job applications, there had been no showing that OMC was prejudiced by those falsifications.* (A. 253)

* An arbitrator must decide two issues in a discipline case: a) whether the employee is guilty of misconduct and b) whether the discipline imposed was appropriate. E.g. Amoco Oil Co. v. Atomic Workers, 548 F.2d 1288 (7th Cir.), cert. denied, 431 U.S. 905 (1977); Ingersoll Products Div., 49 LA 882, 886 (Larkin, 1967);

(footnote continued on next page)

On the other hand, after considering at length
Emporium Capwell Co. v. WACO, 420 U.S. 50 (1975) and other

(footnote continued from preceding page)

Pacific Northwest Bell Telephone Co., 48 LA 498, 500 (Lovell 1967); American National Insurance Co., 44 LA 522, 526 (Doyle 1965) Elkouri and Elkouri, How Arbitration Works (1977), p.621. Thus a finding that an employer did not have just cause for a discharge does not imply - as the NLRB mistakenly contends - some evil motive on the part of the employer but rather only that the discipline meted out was too strict.

Enforcing an award which, as here, held that an employer did not have just cause for a discharge, the Seventh Circuit recently said:

"although the Company acted in compliance with the knowledge in its possession and without unseemly motive in dismissing Semar, such discharge occurred without just cause since the arbitrator remained unpersuaded that Semar was implicated in any wrongdoing which warranted his termination." Amoco Oil, supra, 548 F.2d at 1294

Nonetheless, the arbitrator in Amoco ordered that the employee not receive back pay, upon his reinstatement, because he was involved in misconduct, even though it fell short of misconduct justifying termination. See, also Elkouri and Elkouri at 658. Here, of course, it is undisputed that Soto and Veve engaged in misconduct when they falsified their job applications.

cases, briefed by Soto and Veve's own attorney and their union's counsel, Arbitrator Marlin also concluded that "the distribution of leaflets by the grievants is sufficient to justify denying them reinstatement of their jobs." (A. 256-258, 259) OMC's non-reinstatement was therefore sustained, as of July 9. Id.

This conclusion was premised on two points: 1) that Soto and Veve's leafleting was not protected activity under Emporium Capwell and 2) that their activity was as a matter of contract interpretation, so grossly disloyal that it justified refusing reinstatement.

Applying Emporium Capwell to the facts of this case, Arbitrator Marlin wrote:

"There is a Collective Bargaining Agreement which provides an exclusive means for redressing grievances. This same Agreement specifically prohibits picketing activity during the life of the Agreement. The primary purpose for the existence of grievance machinery is to prevent Employees from engaging in self-help measures in order to redress grievances. The grievants herein did take advantage of the grievance machinery provided them by the contract but, according to their testimony, felt that they could apply additional pressure upon the Company by publicizing those conclusions which they had reached about the Company's employment practices. This activity is not protected by Section 7 of the Act." (A. 251) (emphasis added)

The most significant factor leading to this conclusion, the Arbitrator said was that

"[t]hey claim to have sought only to inform the public as to the alleged racial, sex and union discrimination and terrorist tactics employed by the Company against its workers. Their stated purpose was to inform the public, and apply pressure against the Company by 'rallying support' for their cause." (A. 258)

Not only did the Arbitrator address himself to Emporium Capwell, he also fully analyzed the law on employee disloyalty and found that Soto and Veve had been so grossly disloyal to OMC that they properly had been refused reinstatement.

"The Company is a contractor which provides cleaning and maintenance service to office buildings. Its only product is labor. Public statements to the effect that the Company is racially discriminatory toward and conducts terrorist campaigns against its workers certainly would appear to be potentially damaging to the Company's business. Thus, the grievants' conduct in distributing the above described leaflets must be held to have constituted gross disloyalty toward the Company and calculated to bring pressure to bear by damaging the Company's reputation and its ability to do business." (A. 259)

Despite the fact that Soto and Veve had fully and vigorously participated in the hearings before Arbitrator Marlin - through counsel of their own choosing - and that the Arbitrator's award deals at length with each unfair labor

practice issue involved, the NLRB determined it should not defer to this arbitrator's award, on the ground it is repugnant to the Act. (A. 215, 196-209)

The Administrative Law Judge's opinion, adopted by the NLRB without comment, is devoid of any explanation for this conclusion. (A. 215, 196-209) That the Administrative Law Judge disagreed with some of the Arbitrator's conclusions is plain. Precisely what the "clear repugnancy" to the Act was, however, is never stated.

This inarticulateness is more than a mere stylistic defect. As we show in Point I, infra, it demonstrates that the award should properly have been deferred to and that, for this reason, the NLRB's petition for enforcement should be denied.

In Point II, infra, we show that even if the NLRB did not have to defer to the Arbitrator's award, its conclusion that the legal status of Soto and Veve's leafleting activity was not controlled by Emporium Capwell, supra, 420 U.S. 50 is clearly erroneous. Indeed, the activity

here is virtually identical to that in Emporium Capwell.
Soto and Veve, therefore, were not protected by §7 of
the Act, and OMC's refusal to reinstate them was lawful.*

* Although we believe that the evidence does not establish any anti-union motivation behind the discharge of Soto and Veve, as the Arbitrator held, we are fully aware of the strict Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) standard of review applied to NLRB factual determinations. For this reason, we do not challenge the NLRB's finding on this issue.

ARGUMENT

POINT I

WITHOUT JUSTIFICATION, THE NLRB REFUSED TO DEFER TO AN ARBITRATOR'S OPINION WHICH MEETS EACH TEST FOR DEFERRAL THE NLRB HAS ANNOUNCED;
THE NLRB'S ORDER THEREFORE SHOULD NOT BE ENFORCED

In effect, the NLRB argues that it was proper for it to refuse to defer to Arbitrator Marlin's award because it disagreed with Arbitrator Marlin's findings. Not only is this position unsupportable as a matter of the NLRB's own case law and a repudiation of the test for deferring to arbitration awards carefully enunciated by the NLRB in Spielberg Manufacturing Company, 112 NLRB 1080 (1953), but it also would completely undermine the sound policies underlying Spielberg that deferral to arbitration awards encourages collective bargaining (which it is the purpose of the Act to protect) and prevents dual litigation of claims.

Indeed, the Supreme Court has specifically found that the NLRB's deferral to arbitration awards is rooted in the Act. Arnold Co. v. Carpenters District Council, 417 U.S. 12, 16-17 (1974).

Adopting the NLRB's own statement, the Court said in Arnold Co.:

"an industrial relations dispute may involve conduct which, at least arguably, may contravene both the collective agreement and our statute.

We believe it to be consistent with the fundamental objectives of federal law to require the parties ... to honor their contractual obligations rather than, by casting [their] dispute in statutory terms, to ignore their agreed upon procedures."

417 U.S. at 16 (emphasis added)

Mr. Justice Brennan continued for the unanimous Court:

"The Board's position harmonizes with Congress' articulated concern that, [f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement Sec. 203(d) of LMRA, 29 U.S.C. §173(d)." Id. at 417

The NLRB's own chief articulation of the policies behind Spielberg, Electronic Reproduction Service Corp., 213 NLRB 758 (1974), makes exactly the same points:

"Deferral in either case will encourage collective bargaining. Where there has been an award, as in Spielberg, deferral requires the parties to abide by their agreement that disputes shall be settled by grievance arbitration. If the Board were to decide such a case on the merits, it would permit the parties to ignore their agreement. This would ill serve the statutory purpose of encouraging collective bargaining, especially where that part of the agreement the parties could ignore is itself an integral part of the bargaining process." 213 NLRB at 760 (emphasis added)

The statutory imperative highlighted by Arnold Co. v. Carpenters District Council tells us that parties ought not be able to forum shop or engage in dual litigation, shuttling from arbitrator to Administrative Law Judge to the NLRB in hopes of obtaining a favorable decision. In Electronic Reproduction Service the NLRB made precisely this point:

"As mentioned previously, in deciding Spielberg and Collyer, the Board sought to discourage dual litigation and forum shopping by encouraging the parties to employ initially the contractual procedures for dispute settlement which they have created (Collyer), and to permit the dispute resolution achieved through those procedures to stand in the absence of procedural irregularity or statutory repugnancy (Spielberg)." 213 NLRB at 761.

This case demonstrates the very reasons for the rule of deferring to arbitration awards. Arbitrator Marlin held seven separate days of hearings and issued a 16 page opinion and award. There is no allegation - nor could there be - that the proceedings were anything other than completely fair and regular. Indeed, Soto and Veve's own attorney participated fully at the hearing - in addition to their union's counsel. Now, however, each and every issue considered by the Arbitrator has been relitigated by the NLRB. The NLRB heard the same evidence the Arbitrator did; it considered the same arguments.*

* In fact, here the NLRB itself initially abstained from processing Soto and Veve's charge of an unfair labor practice precisely because the very issues it would consider would be decided in the contractually agreed upon forum: arbitration.

What is the point of this double litigation entailing a vast waste of governmental resources? The Arbitrator devoted no less than half his opinion to the unfair labor practices alleged. He discussed at length the claims of union activity, analyzed alleged anti-union animus, examined precedents such as American Ship Building Co. v. NLRB, 380 U.S. 300 (1965), and Emporium Capwell, supra, among others, and geared his entire decision making process - as he was contractually bound to do - to the issues the NLRB felt called upon to re-decide. The Arbitrator decided the unfair labor practice issues.

If the NLRB is successful here, will it not then have the precedent to second-guess every arbitration award involving a discharge where anti-union animus is alleged? And, will this in turn not lead to parties' failing or refusing to submit their disputes to arbitration? After all, why should they waste their own resources in arbitration if there is substantial likelihood they must relitigate every issue, simply when the NLRB disagrees with the Arbitrator's factual conclusions or legal analysis. Such a result would, itself, be clearly repugnant to the policies of the Act.

It was precisely to forestall such second-guessing of arbitration awards that the NLRB held in Timken Roller Bearing Company, 70 NLRB 500 (1946) that an arbitrator's award should be deferred to even though the NLRB might have reached a

different result on the evidence:

"it would not comport with the sound exercise of our administrative discretion to permit the Union to seek redress under the Act after having initiated arbitration proceedings which, at the Union's request, resulted in the determination upon the merits"

even though:

". . . respondents' refusal to negotiate. . . was not in conformity with the requirements of the Act. . ."

70 NLRB at 501-2.

To accomplish the goal set forth in Timken Roller Bearing, the NLRB carefully stated its standards for deferral in Spielberg:

"In summary, (1) the proceedings appear to have been fair and regular, (2) all parties had agreed to be bound, and (3) the decision of the arbitration panel is not clearly repugnant to the purpose and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award." 112 NLRB at 1082.

The NLRB asserts solely that Arbitrator Marlin's award did not meet the "clearly repugnant" test and that its decision here frustrating the policies underlying Spielberg should be sustained because failing to defer was an exercise of the NLRB's "discretion." The real question is not what test to insulate administrative action from judicial

review should be used to judge the NLRB's failure to defer but rather whether given Timken Roller Bearing and Spielberg's "clearly repugnant" standard, the NLRB does not err when it refuses to defer to an arbitration award solely because it disagrees with the conclusions the arbitrator draws from the evidence.

Indeed, the point is made all the more acute in this case because the NLRB has held it was bound, under Spielberg, by a portion of the Arbitrator's award - that in which he found that the evidence submitted by OMC did not satisfy the contractual just cause standard for discharges.

Presumably this approach is what the NLRB means by "discretion." However, the question remains: Can the NLRB, as a matter of law, pick and choose among an arbitrator's findings, deferring to some but not others when they are all integral parts of one award? The answer must be no. Action by a governmental agency which conforms to no standards other than whim is surely an abuse of discretion.

The NLRB's argument that the arbitration award does not meet Spielberg's standards asserts that the Arbitrator - having said that there might have been some reason, other than lying on their employment applications, behind Soto and Veve's discharges - was thereafter compelled to find a violation of the Act, and that his failure to do so established "repugnancy."

The best answer to why the NLRB's position cannot be sustained is provided by its own case law. In Adolph Coors, Co., 208 NLRB 676 (1974), the NLRB said that where, as here, the record of the arbitration proceedings indicates that the arbitrator was alert to the possibility that the reasons for a discharge may be simply a pretext to disguise anti-union animus, and also as here, the Arbitrator considers and rejects that possibility:

"it will best effectuate the purposes and policies of the Act to give conclusive effect to the decision... in the proceedings before the arbitrator."

From the very face of Arbitrator Marlin's award it is plain that he was alive to the possibility that OMC's asserted reason for firing Soto and Veve was simply a pretext to disguise anti-union animus (as the NLRB argues). Based on the evidence, however, Arbitrator Marlin found no such animus.

Under Adolph Coors and Timken Roller Bearing an arbitrator's award must be deferred to if the arbitrator has considered the possibility that the employer's reason for discharge is a pretext, and rejected that possibility, even if the NLRB would have reached a different conclusion on the evidence. The cases teach that the NLRB may not decide indistinguishable cases differently. If it does - or fails to show a distinction - it abuses its discretion. NLRB v. Metro-

politan Life Ins. Co., 380 U.S. 438 (1965); NLRB v. General Stencils, Inc., 438 F.2d 894, 904 (2d Cir. 1970), further opinion 472 F.2d 170 (2d Cir. 1972):

"due to the Board's lack of articulated reasons for the decisions in and distinctions among these cases, the Board's action here cannot be properly reviewed. When the Board so exercises the discretion given to it by Congress it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.'" NLRB v. Metropolitan Life Ins. Co., 380 U.S. at 442-3

The NLRB's failure to follow Adolph Coors - its own case law - and defer here is, therefore, an abuse of discretion requiring denial of its petition for enforcement.

Timken Roller Bearing and Spielberg establish the parameters of the NLRB's deferral to arbitration awards. Spielberg's test is carefully framed in terms of "clearly repugnant" to establish that deferral is improper only in special circumstances (such as grievant being represented at an arbitration by a union which is the rival of the one he supports). NLRB v. Auburn Rubber Co., 384 F.2d 1 (10th Cir. 1967). No such circumstance is alleged here - nor could it be.

The Tenth Circuit Court of Appeals decision in NLRB v. Auburn Rubber Co. supra, illustrates this, holding that in an ordinary case the NLRB is constrained to defer, whereas in exceptional circumstances it is not.

There, an arbitrator had held that certain company conduct did not violate §8(a)(1) of the Act. The NLRB, however, refused to defer, simply because (as here) it would have reached a different result on the evidence. Refusing to enforce this portion of the NLRB's order, the Court wrote:

"Full opportunity was afforded for the presentation of all pertinent evidence [at the arbitration]... In our opinion all the Spielberg tests have been met. The award was fair and the result is not repugnant to the Act....We believe the Board abused its discretion and acted contrary to its established policies in hpholding the §§8(a)(1) charges." Id. at 3.

On the other hand, the Tenth Circuit held that the award should not be deferred to with respect to the six employees who had been discharged. At the employer's plant, the employees were represented by the Teamsters, but the Rubber Worker's Union was waging a vigorous campaign to oust the Teamsters. The six who had been discharged were dissident employees who were Rubber Workers adherents. Their grievances were presented by the Teamsters - the very union against which they were campaigning, thus placing them in the position of being represented by the union they were seeking to turn out. Unlike the situation here, where Soto and Veve vigorously participated at their hearing through counsel of their own, these six did not participate at their hearing.

The court said:

"In our opinion it would be unfair and repugnant to the Act to bind the six discriminatees to the arbitrator's award. They relied on the previously filed unfair labor practice charges and their representations at the arbitration hearings was by a union other than the competing union in whose behalf they incurred the displeasure of The Company."

Id. at 4.

Auburn Tire teaches that clear repugnancy is not established just because the NLRB draws factual conclusions different from the Arbitrator. On the contrary, the "clearly repugnant" standard contemplates something far more, such as the potential for non-vigorous presentation of a claim. Auburn Tire thus tells us that it was an abuse of the NLRB's discretion to fail to defer to Arbitrator Marlin's award. All the NLRB has asserted is that its conclusions differ from Arbitrator Marlin.

What has been said above also shows that the NLRB erred in failing to defer to the Arbitrator's award on the question of Soto and Veve's reinstatement. Here the issue was whether Soto and Veve's picketing was protected activity under the Act. Relying on Emporium Capwell, supra, the Arbitrator said it was not. Seeking to distinguish Emporium Capwell on its facts, the NLRB argues it was.

Here again the NLRB simply disagreed with the Arbitrator. We show in Point II that even assuming the NLRB need not have deferred, the Arbitrator was clearly correct that Emporium Capwell controls. But even if it were a close analytical question, Timken Roller Bearing, Spielberg and Auburn Tire, impel the conclusion that the NLRB should not have failed to defer simply because it disagreed with the Arbitrator.

Beyond this, the Arbitrator's discussion of the leafleting incidents arises in the context of his deciding what the appropriate remedy would be against Soto and Veve for their lying on their employment applications. Under the teaching of the Supreme Court the NLRB's rejection of this fashioning of remedies cannot stand:

"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies."
United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

Thus the NLRB has not showed any "clear repugnancy" in the Arbitration award. Because it failed to defer to Arbitrator Marlin's award, which meets all of Spielberg's criteria, the NLRB abused its discretion and its petition for enforcement should be denied.

POINT II

SOTO AND VEVE'S LEAFLETING
ACTIVITY WAS NOT PROTECTED
BY THE ACT, AND OMC'S
CONSEQUENT REFUSAL TO
REINSTATE THEM DID NOT,
THEREFORE, VIOLATE THE ACT.

OMC discharged Soto and Veve on July 3, 1975 and refused to reinstate them because of their leafleting activity. Even assuming that the NLRB properly refused to defer to Arbitrator Marlin's award and properly held that the discharge violated the Act, the NLRB's decision that OMC's failure to reinstate Soto and Veve also violated the Act is clearly erroneous. Thus, if any remedy is appropriate here, it may only be for back pay from the time of discharge until the time of leafleting, exactly as the Arbitrator held.

Soto and Veve were not engaged in protected activity when they leafleted in July and again in October. Their purpose was clear. They sought to go outside the contract, around their duly designated bargaining representative, to rally public support on their allegations of racial discrimination.*

There is absolutely no evidence that they ever presented their complaints to their union first, nor that they ever suggested that fellow employees use the grievance process to assert claims of racial discrimination.

* At their arbitration hearing, Soto and Veve stated the purpose of their leafleting as informing the public and applying pressure against Respondent by rallying support for their cause.

Soto's statement that he

"was trying to exert some pressure
on some of the issues that were in
the leaflet," (A.58)

shows quite starkly what he sought. By his actions, Soto hoped OMC would change those policies which he considered racially discriminatory. He wanted OMC to agree to this because of the pressure he exerted by rallying public support for his cause. This was all to be without the aid of the union, which expressly told Soto and Veve not to leaflet because of potential damage to their arbitration.

But Soto and Veve ignored the union on this, just as they had by being involved in writing directly to the arbitrator, seeking to influence the outcome of their case, even after hearings had commenced. Soto and Veve thus sought to achieve resolution of their grievances by dealing directly against their employer, without their union as an intermediary. They went to the public and the arbitrator on their own, thus undermining their union's role as their exclusive representative.

For these reasons Soto and Veve's activity was not protected under §7. Emporium Capwell Co. v. Waco, 420 U.S. 50 (1975).

In Emporium Capwell, also, employees sought to go outside regularly established contractual procedures to publicize their own views on their employer's employment practices, and rally

support for their cause. The employees picketed their employer, describing it in terms duplicating those which Soto and Veve used

"For years at The Emporium black, brown, yellow and red people have worked at the lowest jobs, at the lowest levels. Time and time again we have seen intelligent, hard working brothers and sisters denied promotions and respect.

"The Emporium is a 20th Century colonial plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of Africa."
420 U.S. at 55-6

Thus, on almost identical facts, the Supreme Court held in Emporium Capwell that employees - who take matters into their own hands and go outside regularly established contractual procedures as well as ignore the offices of their union, just as Soto and Veve did - are not protected by §7 of the Act.

"The policy of industrial self-determination as expressed in §7 does not require fragmentation of the bargaining unit along racial lines in order to consist with the national labor policy against discrimination. And in the face of such fragmentation, whatever its effect on discriminatory practices, the bargaining process that the principle of exclusive representation is meant to lubricate could not endure unhampered."
420 U.S. at 70.

The NLRB seeks to avoid the control of Emporium Capwell, relying on Dreis & Krump Manufacturing, Inc., 221 NLRB 309 (1975)

enf'd 544 F.2d 320 (7th Cir. 1976). The differences between that case and this, however, are manifest.

In Dreis & Krump leafleting was conducted only on company premises. Here it occurred on busy New York City streets.

In Dreis & Krump leaflets were distributed only to fellow employees. Here, as Soto proudly related, leaflets went to the general public for the explicit purposes of rallying their support.

In Dreis & Krump the reason for the leafleting was to solicit support from fellow employees for an individual grievance by urging the filing of other, similar grievances. Here, neither Soto nor Veve urged fellow employees to use the grievance process to assert claims of racial discrimination. Instead, rather than proceed in an orderly fashion through their arbitration, Soto and Veve caused the arbitrator to be written directly and without their union's knowledge. They also distributed leaflets - to the general public - against express warnings from their union not to.

Just how far Soto and Veve went to undermine their union is demonstrated by NLRB v. Lasaponara & Sons, Inc., 541 F.2d 992 (2d Cir.) cert denied 430 U.S. 914 (1976), on which the NLRB curiously relies. There, employees sought not to work Palm Sunday. As this Court stated: "The Chairman

of the Union shop committee presented plant manager Fazzino with a petition signed by twelve of the Company's twenty employees protesting the scheduling of Palm Sunday, April 2 as a work day." 541 F.2d at 993.

Unlike Soto and Veve, the employees in Lasaponara were led by and supported their union in its attempt to press a grievance. Instead of ignoring the union to bring pressure on the Company through the public (as Soto and Veve did), the employees engaged in traditional union based concerted activity. They went through their union, rather than resorting to the end run of leafleting - against the union's advice.

Far from supporting the NLRB's position here, Lasaponara and Dreis & Krump teach that Soto and Veve engaged in unprotected activity. In sharp contrast to those cases, Soto and Veve abjured available contractual procedures individually to assert their charges of racism, ignored and by-passed their union and appealed not to their employer and fellow employees but instead to the general public.*

* Arbitrator Marlin also found that, as a matter of contract interpretation, Soto and Veve's leafleting had been so grossly disloyal to OMC that it justified OMC's refusal to reinstate the

OMC is a cleaning contractor which cleans commercial buildings where there are numerous tenants. It is in competition with a number of other cleaning contractors. If the tenants of a building express displeasure with the cleaning contractor - for whatever reason - to the building owner, the cleaning contractor's contract may be cancelled or not renewed. By "exerting pressure" and rallying public support in front of the main entrance to One Penn Plaza, Soto and Veve engaged in activity clearly calculated to injure OMC's business. It hit

This is exactly what happened in Emporium Capwell.
The Supreme Court's opinion therefore controls and requires
the finding that Soto and Veve's leafleting was not pro-
tected under the Act.

CONCLUSION

For all of the foregoing reasons, the National Labor
Relations Board's petition for enforcement should be denied.

Respectfully submitted

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OF COUNSEL:

Marvin Dicker
Jonathan L. Sulds

Dated: April 17. 1978

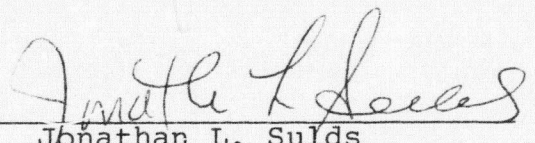
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at OMC through building tenants. Indeed, OMC was later to
lose the contract. Because Soto and Veve were not engaged
in protected activity when they leafleted, the failure to
reinstate them does not violate the Act. Arbitrator Marlin's
contract interpretation on reinstatement therefore must
stand. United Steelworkers of America v. Enterprise Wheel
and Car Corp., supra.

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of
the attached Respondent's Brief have this day been served
by mail on

William R. Stewart, Esq.
National Labor Relations Board
Washington, D. C. 20570


Jonathan L. Sulds

Dated: New York, New York
April 17, 1978.

